CITIBANK, N.A.

v.

WONG NGAI POH

HIGH COURT MALAYA, KUALA LUMPUR
PEH SWEE CHIN J
[ORIGINATING SUMMONS NO. F 728 OF 1982]
25 MARCH 1983

LAND LAW: *Charge - Loan and interest payable on demand - Notice in Form 16E for repayment - Section 255 National Land Code - Application for order of sale - Affidavit indicating default on part of chargor - Whether notice proper - Notice including interest - Whether defective - Exact amount not specified in application for order of sale - Whether application defective.*

The defendant ("the chargor") had charged his land as a collateral security for a loan. Loan and interest were repayable on demand. Notice was served by the plaintiff ("the chargee") in Form 16E, under s. 255, National Land Code, demanding repayment of the sum due with interest. The chargee applied for an order of sale. Its affidavit indicated that the loan was being recalled because of default.

Held:

[1] There was no doubt that the sum due was being demanded under s. 255, and the inaptitude of the affidavit could not amount to more than a curable irregularity in any event.

[2] The addition of the words "And Interest" on Form 16E did not make it defective. Form 16E under s. 255 could be used for demanding both principal and interest. *Jacob v. Oversea-Chinese Banking Corporation, Ipoh (FC)* [1974] 2 MLJ 161.

[3] Neither was the application for order of sale defective because the exact amount of interest due was not specified. The requirement in s. 257(1) is imposed on the Court making an order for sale as distinct from any requirement imposed on the chargee. Any implicit requirement on the chargee to specify the exact amount of interest is deemed complied with by his supplying the necessary data to help the Court determine the amount due. Section 257(1)(c) is merely directory. [*Central Malaysian Finance Bhd. v. Loke Kok Lai* [1975] 1 MLJ 160 not followed].

[Plaintiff's application allowed. Order for sale granted.]

Cases referred to:
Jacob v. Oversea-Chinese Banking Corporation, Ipoh [1974] 2 MLJ 161
Central Malaysian Finance Bhd. v. Loke Kok Lai [1975] 1 MLJ 160

Legislation referred to:
National Land Code 1965, ss. 254, 255, 257(1)(c)

For the plaintiff - Solomon; M/s. Shearn Delamore & Co.
For the defendant - Low Kim Siong; M/s. Mian Lee & Partners

JUDGMENT

Peh Swee Chin J:

The plaintiff applied for an order of sale of land charged earlier by the defendant as a collateral security for a housing loan of RM76,000. I shall refer to the plaintiff as chargee and the defendant as chargor respectively.

Under Clause 1 of the annexure to the charge, the chargor agreed that he would pay the chargee, the loan and interest, on demand, although the chargor was allowed to repay the loan by 180 monthly instalments of RM786 each, "until demand as aforesaid ..."

In the affidavit filed in support of the chargee's application, the deponent, the Assistant Vice-President of the chargee deposed to the default made by the chargor, (but without mentioning particulars of such default) and annexed a copy of plaintiff's solicitors' letter dated 5 March 1982 demanding simply the repayment of the sum due with interest, and also a copy of the Form 16E prescribed under s. 255 of the National Land Code. The said affidavit, *ex facie*, gave a very clear indication that the loan was being recalled because of default. Not unnaturally, this put the chargor on the defensive, who contested the application of the chargee by filing an affidavit in reply showing that, indeed he had not been guilty of any breach or default at the material times.

When this application came up for hearing, the stand taken by the chargee, however, was not one of default on the part of the chargor but one of recalling the loan repayable on demand. It must therefore have appeared to the chargor that the chargee was changing its horse in midstream. I will briefly set out their respective arguments.

Learned Counsel for the chargor took three points. He submitted, first, that by virtue of the affidavit of the chargee's Assistant Vice-President referred to above, the chargee was proceeding on the ground of default under s. 254 of the National Land Code, and therefore the Form 16E used was wrong. Secondly, he submitted that by adding the words "AND INTEREST" to the heading of Form 16E used herein, and by claiming interest, the Form 16E used was thus defective. Thirdly, the whole application of the chargee was defective in not stating or specifying the exact amount of interest due.

Learned Counsel for the chargee submitted, in return, that proof of default was not necessary as the loan was payable on demand and therefore Form 16E herein was correctly used. Further, the affidavit impugned merely showed the history of the matter between the parties, and the inconsistent payments made by the chargor, and this was the reason for recalling the loan. Form 16E could be used for demanding both principal and interest. She submitted that the interest was not specified because it was not quantified as the chargee did not know when its application would be heard.

In my view, the terms of the charge made it beyond peradventure that the loan was repayable on demand. Again the Form 16E that was served on the chargor should equally have left him in no doubt that the sum due was being demanded under s. 255 of the National Land Code which provides expressly that where the principal is payable on demand, demand may be made by Form 16E. Much as I sympathised with the chargor for having to face that rather incongruous affidavit of the chargee referred to above, all the documents, as filed by the chargee and taken together, should not have misled the chargor. Neither did I think that such an affidavit could have the effect of invalidating or rendering void the proceedings herein, for the affidavit impugned did not have the sort of sanctity of a prescribed form under Form 16E. The inaptitude of the affidavit could not amount to more than a curable irregularity in any event.

On the claim for interest by Form 16E, the decision of the Federal Court in *Jacob v. Oversea-Chinese Banking Corporation, Ipoh* [1974] 2 MLJ 161 has set the controversy at rest by holding that Form 16E prescribed under s. 255 could be used for demanding both principal and interest, and further that the words **"AND INTEREST"** could be added to the heading of Form 16E, per Lee Hun Hoe CJ (Borneo). It will not be necessary to refer to all other cases cited by Counsel.

On the third point that the application was defective because the exact amount of interest due was not specified, learned Counsel relied on s. 257(1)(c) of the National Land Code and the case of *Central Malaysian Finance Bhd. v. Loke Kok Lai* [1975] 1 MLJ 160; s. 257(1)(c) provides:

> 257. (1) Every order for sale made by the Court under s. 256 shall -
>
> (a) ...
>
> (b) ...
>
> (c) specify the total amount due to the chargee at the date on which the order is made;

It will be immediately apparent that this is a requirement imposed on the Court when making an order for sale, as distinct from a requirement imposed on a chargee when filing an application for an order for sale. However, the chargor herein, was not complaining that he was misled as to the amount due but that there was failure to comply with s. 257(1)(c). Putting the argument of learned Counsel at its highest, let's say, that there was an implicit requirement on the chargee to specify the exact amount of interest, such requirement would have been deemed as complied with by the chargee supplying the necessary data, such as the rate of interest and the material dates etc. to enable the Court to determine, if need be, the exact amount, as was done in the case. I therefore dismissed this objection. I have one observation to make, in this connection. In practice, the Court has never specified the precise amount due on making an order for sale which, more often than not, as drafted, approved and extracted, provides to the effect, that the land be sold by public auction etc. to satisfy the sum of so much and interest from such and such a date to date of payment. This s. 257(1)(c) has in fact often been regarded by the Court as merely directory. In practice, it happens very often that it is only, after all the proceeds of sale are in hand after all just deductions, that the clerk of the Court in charge, will then ascertain the precise amount due from the chargee and/or chargor with a view to paying the same.

Because of my own view on s. 257(1)(c) of the National Land Code in relation to the omission to specify the exact amount of interest, in a chargee's application, with very great respect to the learned Judge in the case of *Central Malaysian Bhd.* (*supra*), it will mean that I did not follow that part of the judgment in that case on this particular point.

I therefore allowed the application of the chargee in terms as prayed.

Also found at [1983] 1 CLJ 297